BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES A. BALDWIN Claimant	)	
VS.	)	Docket No. 1,055,989
THE BOEING COMPANY Respondent	)	
AND	)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the November 17, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 17, 2011, preliminary hearing;[1] the transcript of the August 18, 2011, preliminary hearing and exhibits thereto; the September 20, 2011, independent medical examination report of Dr. David W. Hufford; and all pleadings contained in the administrative file.

ISSUES

Claimant filed an Application for Hearing on May 18, 2011, alleging repetitive injuries to the "[n]eck, bilateral arms, and all body parts affected," and that the date of accident was

[1] The transcript of the November 17, 2011, hearing is titled "Regular Hearing." It appears that is an error. On page 3 of the November 17, 2011, hearing transcript, the ALJ states: "This is a preliminary hearing," and at that same page claimant's counsel states that it is a follow-up preliminary hearing to the August 18, 2011, preliminary hearing.

"February 2010 & EEWD [each and every working day] through date of written claim pursuant to KSA 44-508(d)." The cause of the injury was listed only as "[r]epetitive trauma."[2] At a preliminary hearing on August 18, 2011, claimant alleged the date of accident for the repetitive traumas was from January 2010 through May 9, 2011, the date he submitted a written claim for compensation. At the August 18, 2011, preliminary hearing, claimant requested that the ALJ assign claimant an authorized treating physician.

Respondent raises three defenses: (1) If claimant suffered any work-related injuries, those injuries resulted from a single traumatic incident on January 19, 2010, the date claimant operated a floor cleaner; (2) Claimant's symptoms are the result of cervical degenerative disc disease and subsequent radiculopathy with a very mild component of carpal tunnel syndrome and that the incident of January 19, 2010, was not a significant or accelerating factor; and (3) If the incident on January 19, 2010, caused or aggravated claimant's symptomology, claimant did not provide timely notice or timely written claim.

Following the August 18, 2011, preliminary hearing, the ALJ issued an Order authorizing Dr. David Hufford ". . . to perform an independent medical examination to determine if the Claimant's present problems with his hands and neck are the result of work activities at the Respondent through May 9, 2011."[3] Dr. Hufford examined claimant on September 20, 2011, and sent a letter to the ALJ dated the same day. A second preliminary hearing was held on November 17, 2011.

On November 17, 2011, the ALJ entered an Order denying claimant's request for medical treatment.

The issues are as follows:

1. Did claimant suffer a single traumatic accident on January 19, 2010, or a series of repetitive traumas from January 2010 through May 9, 2011?

2. If claimant suffered a series of repetitive injuries, what is his date of accident?

3. Did claimant give timely notice of the accident to respondent and provide timely written claim?

4. Are claimant's injuries work related? Claimant asserts his cervical injuries and carpal tunnel syndrome were the result of repetitive traumas from work activities. Respondent asserts that claimant suffered a single traumatic incident on January 19, 2010, but none of claimant's current injuries are the result of that incident.

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[2] Application for Hearing (filed May 18, 2011).

[3] ALJ Order (Aug. 18, 2011).

5. Did the ALJ exceed his jurisdiction by allowing a medical doctor to become a finder of fact in violation of the Kansas Workers Compensation Act?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was employed by respondent for 27 years. His last day of working for respondent was June 29, 2011. In January 2010, claimant's position with respondent was "a sheet metal mod, electrical mechanic, mod mechanic."[4] On January 19, 2010, claimant was asked to operate a floor cleaner. He had not previously operated the floor cleaner and he was asked to clean a floor that was approximately three-fourths the size of a football field. The job task took claimant approximately two and one-half hours to complete. Two days later claimant noticed tingling in his index fingers and thumbs and his neck was stiff and sore. Claimant testified he told his supervisor, Steve Ross, about the problems he experienced after cleaning the floor.[5] However, a January 14, 2011, record from Boeing Central Medical indicates that claimant stated he was unsure whether he reported his injury or symptoms to his supervisor in early 2010.[6]

For the next five or six months, claimant's job entailed moving desks and file cabinets and sweeping and dusting. Claimant asserts his repetitive job duties caused his injuries. Claimant testified that moving the file cabinets and desks and cleaning shelves aggravated the problems he noticed two days after January 19, 2010. He testified as follows:

> Q. (Mr. Riedmiller) Was there any heavy lifting in those activities?
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> A. (Claimant) Yes, the file cabinets and the desks.
>
> Q. Do you remember having any particular accident or incident with lifting, where all of the sudden you had a new complaint or a new pain or something like that?
>
> A. No.[7]

In November 2010, claimant returned to working on airplanes as a sheet metal mod mechanic. He would drill with a drill motor, rivet, buck with a buck bar and/or a rivet gun and use screwdrivers, ratchets and sockets. He would also use a Dotco cutter to cut

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[4] P.H. Trans. (Aug. 18, 2011) at 7.

[5] *Id.*, at 18-19.

[6] *Id.*, Resp. Ex. 2.

[7] *Id.*, at 11.

aluminum. Claimant testified that this work activity caused additional complaints or the problems in his hands to worsen and increased his neck symptoms. He could not identify a specific incident as a sheet metal mod mechanic that caused his neck condition to worsen. Claimant indicated a lot of tight areas in the airplanes where he was working to get around ducts, wire bundles and other structures caused difficulties with his neck.

Claimant testified he continued to work as a sheet metal mod mechanic until he saw Dr. Anthony Pollock. Dr. Pollock's records were not placed into evidence. A report from Dr. George G. Fluter, whom claimant saw at his attorney's request on June 30, 2011, indicated claimant saw Dr. Pollock from March 7, 2011, to May 3, 2011, with regard to numbness and tingling in claimant's hands of one year's duration.[8] Claimant testified that he was given temporary restrictions by Dr. Pollock and he then worked light duty. Claimant testified that Dr. Pollock had claimant undergo an MRI and referred claimant to a Dr. Lothes. Dr. Lothes told claimant that he had bulging discs, which were probably causing the numbness in his hands.

Claimant testified that a year before January 2010 he had problems with tingling in his hands and that Dr. Pollock provided treatment. After the treatment his hands stayed the same. Claimant indicated that he currently had the same type of tingling, but the tingling was now worse, especially when he used his hands.[9] However, when claimant later was asked about the tingling in his hands, he testified as follows:

> Q. (Mr. Riedmiller) So describe for me then what your hands felt like immediately before you started doing the floor sweeping job where you spent two and a half hours, I think it was January 19, 2010; what did your hands feel like then?
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> A. (Claimant) Normal, I mean, no tingling.
>
> Q. So when did that tingling go away that you had about a year before?
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> A. Well, I'm not -- evidently, I'm not understanding the question, because ever since the January 19th of 2010, when I was running that machine, two days later I started getting tingling in my hands from running it, I guess. I don't know, probably 20 -- 27 years of working out there pretty much caused my injuries.[10]

On January 14, 2011, claimant reported that he was having tingling in his hands and stiffness in his neck to Boeing Central Medical. The report of Boeing Central Medical from that date states claimant was "[h]ere to report bilateral n/t to hands/fingers that he attributes

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[8] *Id.*, Cl. Ex. 1 at 2.

[9] *Id.*, at 17-18.

[10] *Id.*, at 20.

to a specific work related incident that occurred in early 2010."[11] As indicated above, the report stated claimant was unsure whether he reported the injury or symptoms to his supervisor in early 2010.

Claimant was sent by his counsel to see Dr. George G. Fluter on June 30, 2011. Dr. Fluter assessed claimant with six medical conditions and gave claimant significant temporary restrictions. The six medical conditions were bilateral upper extremity dysesthesias; bilateral carpal tunnel syndrome, mild; bilateral C5 and C8 chronic radiculopathies; multilevel cervical spondylosis with possible spinal cord involvement; right shoulder pain/tendinitis/bursitis; and left shoulder pain/impingement/tendinitis/bursitis. He opined there was a causal/contributory relationship between claimant's condition and repetitive forceful work-related activities done as a sheet metal mechanic. Dr. Fluter also indicated the prevailing factor affecting claimant's condition was his work-related activities leading to repetitive trauma of the upper extremities and neck/upper back.

On August 18, 2011, the ALJ issued his Order authorizing Dr. Hufford to perform an independent medical examination (IME) of claimant to determine if claimant's present neck and hand problems were the result of work activities at respondent through May 9, 2011. Dr. Hufford performed the IME on September 20, 2011. It appears Dr. Hufford reviewed the records of Drs. Pollock and Lothes, as well as those of Dr. Schwertfeger, a neurologist. A nerve conduction test conducted by Dr. Schwertfeger in April 2011 indicated mild bilateral median nerve entrapment and a chronic C5 and C8 radiculopathy. A June 2011 MRI of claimant's cervical spine revealed multilevel degenerative disc disease. Dr. Hufford indicated that Dr. Lothes recommended a multilevel cervical spine fusion.

Dr. Hufford opined claimant had bilateral hand paresthesias with cervical degenerative disc disease, cervical radiculopathy and mild bilateral carpal tunnel syndrome. The doctor stated in his report:

> It is my opinion that his current symptomatology is due to cervical degenerative disc disease and subsequent radiculopathy with a very mild component of carpal tunnel syndrome. It is further my opinion that the events of January 19, 2010 did not cause median nerve entrapment nor does it constitute a significant aggravating or accelerating factor. The gradual progression of his symptoms to now involve all the fingers of both hands combined with his nerve conduction study results indicate that the majority of his symptoms are due to the cervical degenerative disc disease and the activity of using the floor sweeper did not cause, aggravate nor accelerate this condition, either. . . . Causation for the carpal tunnel syndrome is, more likely than not, a result of repetitive use of his hands in the conduct of his employment over the entirety of the 27 years that he has work *[sic]* for the Boeing Company rather than the isolated incident of using the floor sweeper on one day in January, 2010.[12]

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[11] *Id.*, Resp. Ex. 2.

[12] Hufford Report at 2.

A second preliminary hearing was held on November 17, 2011. No testimony was taken and the transcript consists entirely of argument by claimant's and respondent's counsel. The only language in the ALJ's Order of November 17, 2011, other than denying medical treatment is as follows:

> Dr. David Hufford performed an independent medical examination on September 20, 2011. He states: "It is my opinion that his current symptomatology is due to cervical degenerative disc disease and subsequent radiculectomy *[sic]* with a very mild component of carpel *[sic]* tunnel syndrome. It is further my opinion that the events of January 19, 2010 did not cause median nerve entrapment nor does it constitute a significant aggravating or accelerating factor."

The ALJ implied that claimant was only alleging or only suffered a single traumatic incident on January 19, 2010, and that none of claimant's injuries were causally related to that incident. Consequently, the ALJ denied claimant's request for medical treatment.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.[13]

K.S.A. 2010 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee

[13] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

> from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

ANALYSIS

In his Order of August 18, 2011, the ALJ authorized Dr. Hufford to perform an IME to determine if claimant's present problems with his hands and neck were the result of work activities at the respondent through May 9, 2011. Dr. Hufford's impression was that claimant had bilateral hand paresthesias with cervical degenerative disc disease, cervical radiculopathy and mild bilateral carpal tunnel syndrome. Dr. Hufford indicated that claimant's cervical disc degeneration was not caused, aggravated or accelerated by the incident on January 19, 2010, or by claimant's use of a floor sweeper. However, Dr. Hufford did not give an opinion as to whether claimant's cervical degenerative disc disease and cervical radiculopathy were caused, aggravated or accelerated by claimant's repetitive work activities at respondent through May 9, 2011, as ordered by the ALJ.

Without a determination from Dr. Hufford as to whether claimant's work activities through May 9, 2011, caused, aggravated or accelerated claimant's cervical condition, this Board Member must scrutinize the remaining evidence. Claimant testified repeatedly that

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[14] K.S.A. 44-534a.

[15] K.S.A. 2010 Supp. 44-555c(k).

his neck and hand complaints resulted from his repetitive work activities. The claimant's most compelling testimony was when he stated that "probably 20 -- 27 years of working out there pretty much caused my injuries." Dr. Fluter opined that, within a reasonable degree of medical probability, there was a causal/contributory relationship between claimant's medical condition and his repetitive forceful work-related activities performed as a sheet metal mechanic. Simply put, claimant by the barest of margins met his burden of proving by a preponderance of the evidence that his cervical injuries resulted from his repetitive work activities through May 9, 2011.

In addition, Dr. Hufford opined that it is more likely than not that claimant's carpal tunnel syndrome was caused by work-related repetitive use of his hands. The ALJ did not address claimant's carpal tunnel syndrome in his Order of November 17, 2011. The ALJ's Order is also silent on claimant's allegation that his injuries resulted from a series of work-related accidents and repetitive traumas. Because both Dr. Fluter and Dr. Hufford indicated that it was more likely than not that claimant's carpal tunnel syndrome was caused by repetitive use of his hands during work activities, this Board Member finds that claimant developed bilateral carpal tunnel syndrome as a result of a series of repetitive traumas arising out of and in the course of his employment with respondent.

Claimant asserts that the date of accident for injuries suffered as a result of repetitive traumas is May 9, 2011, the date claimant made a written claim for compensation. This is supported by the language of K.S.A. 2010 Supp. 44-508(d). Claimant was not taken off work or given restrictions by an authorized physician. Therefore, claimant's date of accident is the earliest of the following dates: the date upon which claimant gave written notice to the respondent of the injury or the date claimant's condition was diagnosed as work related and communicated in writing to the injured worker. Claimant made a written claim for compensation on May 9, 2011. There is no evidence in the record that prior to May 9, 2011, claimant was advised in writing by a physician that his condition was work related. This Board Member finds the date of accident for claimant's carpal tunnel syndrome was May 9, 2011, the date claimant made his written claim for compensation. Pursuant to K.S.A. 44-520 and K.S.A. 44-520a, claimant gave timely notice to respondent and made a timely written claim. The issues of whether claimant gave timely notice and made timely written claim after the January 19, 2010, incident are moot.

Claimant alleges that the ALJ exceeded his jurisdiction by allowing Dr. Hufford to become a finder of fact in violation of the Kansas Workers Compensation Act. The facts do not support this allegation. In *Mayne*,[16] the ALJ directed that Mayne submit to an IME by Dr. Stein to determine causation. The ALJ indicated in his Order that if Dr. Stein found treatment necessary and causally related, Dr. Stein would be authorized to treat or refer Mayne for treatment. The respondent appealed, alleging the ALJ exceeded his jurisdiction. A Board Member concurred and struck that portion of the ALJ's Order improperly delegating

[16] *Mayne v. Groendyke Transport, Inc.*, No. 1,048,281, 2010 WL 1445637 (Kan. WCAB Mar. 24, 2010).

his authority to determine causation to Dr. Stein. This Board Member finds that ALJ Clark did not err by ordering Dr. Hufford to perform an IME to assist in determining causation. The ALJ took into consideration the opinion of Dr. Hufford with regard to causation and then rendered a decision. The ALJ, not Dr. Hufford, acted as fact finder.

CONCLUSION

1. Claimant suffered a series of repetitive traumas from work-related activities each and every day worked and culminating on May 9, 2011.

2. Claimant's date of accident is May 9, 2011.

3. Claimant gave timely notice of the accident and made a timely written claim to respondent when he made a written claim for compensation on May 9, 2011.

4. Claimant sustained cervical injuries and carpal tunnel syndrome as a result of repetitive traumas arising out of and in the course of his employment with respondent.

5. The ALJ did not allow a medical doctor to become a finder of fact in violation of the Kansas Workers Compensation Act.

WHEREFORE, the undersigned Board Member reverses the November 17, 2011, preliminary hearing Order entered by ALJ Clark. This matter is remanded to the ALJ to issue further orders consistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge